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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 230

PETER J. CARPENTER, Petitioner,

vs.

WABASH RAILWAY COMPANY, FRANK C. NICODEMUS, JR., NORMAN B. PITCAIRN, Receivers of Wabash Railway Company, CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, and THE CENTRAL HANOVER BANK & TRUST COMPANY, as Trustee.

T. J. MOSS TIE COMPANY,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT,

AND

BRIEF IN SUPPORT THEREOF.

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INDEX.

	Page
Petition for writ of certiorari	1
Questions presented	2
Summary statement of matter involved	3
Reasons relied on for allowance of writ	10
Supporting brief	14-27
Opinions of the courts below	14
Jurisdiction of this Court	14
Date of judgment in Circuit Court of Appeals	14
Statement	15
Specifications of error	15
Argument	17
Point I (Assignment of Errors A and B)	17
Point II (Assignment of Error C)	24
Point III (Assignment of Error D)	26
Conclusion	27

Cases Cited.

Bowen v. Hockley et al., 71 F. (2d) 781, 784-786 ..... 10, 20, 21, 22

Central Hanover Bank & Trust Co. v. Williams (C. C. A. 8), 95 F. (2d) 210 ..... 18, 19

Childs v. County Trust Company of New York, 70 F. (2d) 1012 (affirming 6 F. Supp. 821) 11

Employers' Liability Assurance Corporation v. Astoria Mahogany Company, 6 F. (2d) 945, 946 (C. C. A. 2) 11, 26
Erie Railroad Company v. Tompkins, 302 U. S. 671 ... 14
Holman v. Cross, 75 F. (2d) 909, 913 ..... 10, 26
In re Metropolitan Railway Receivership, 208 U. S. 90, 112 11
Ivanhoe Building & Loan Association of Newark v. Orr, 295 U. S. 243 14
LaGrange Butter Tub Co. v. National Bank of Commerce, 122 Mo. 154, 159-160, 26 S. W. 710, 711 25
Lone Star Gas Company v. City of Fort Worth, 93 F. (2d) 584, 585 ..... 11, 27
McCullough v. Union Traction Co., 206 Ind. 585, 607 et seq., 186 N. E. 300, 308 et seq. 23
Milwaukee and Minnesota Railroad Company et al. v. Soutter etc., 69 U. S. 510, 524 11
People etc. v. Hopkins et al., 18 F. (2d) 731, 732, 733 .. 11
The Anasoldo San Georgio I. v. Rheinstrom Brothers, 294 U. S. 494 14
Warner v. New Orleans, 167 U. S. 467 14

Statutes Cited.

Bankruptcy Act, Sec. 77 [11 U. S. C. A., Sec. 205 (n)] 2, 3, 7, 8, 9, 12, 18, 19, 22
Judicial Code, Sec. 240 (a), as amended by Act of Feb. 13, 1925, 43 Stat. 938 (28 U. S. C. A., Sec. 347) 14
Revised Statutes of Missouri 1929, Secs. 1104, 1105 .. 24, 25

Textbooks Cited.

34 Corpus Juris 631 25
Clark on Receivers, Vol. 1, Sec. 541 (C), page 736 ... 25

SUPREME COURT OF THE UNITED STATES.

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WABASH RAILWAY COMPANY, FRANK C. NICODEMUS, JR., NORMAN B. PITCAIRN, Receivers of Wabash Railway Company, CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, and THE CENTRAL HANOVER BANK & TRUST COMPANY, as Trustee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Now comes Peter J. Carpenter, petitioner, and respectfully petitions this Honorable Court to grant a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, and to remove therefrom to this Court, for review, the record in the case lately pending in said Circuit Court of Appeals styled Peter J. Carpenter, Appellant, vs. Wabash Railway Company et al, Appellees, being cause No. 11,354, in equity, on the docket of said Circuit Court of Appeals. The duly certified record, including all

the proceedings in the District Court of the United States for the Eastern District of Missouri, where said cause was heard, and in the said Circuit Court of Appeals, to which an appeal was taken by petitioner from the judgment of the trial court, is filed herewith under separate cover.

Your petitioner represents that he is aggrieved by the decision and judgment of said Circuit Court of Appeals in said cause wherein said Circuit Court of Appeals on May 18, 1939, affirmed the judgment of the trial court, and on June 12, 1939, thereafter denied this petitioner's petition for a rehearing of said cause.

Your petitioner states that the matters of issue in said cause are of peculiar gravity and great general importance, in that the following are the principal questions presented:

Questions Presented.

1. Whether, in an equity receivership proceeding for the reorganization of a railroad, personal injury claims of railroad employes should not receive treatment equal to that as such claims would receive, as prescribed by Congress, in a proceeding for the reorganization of a railroad under Section 77 of the Bankruptcy Act, and, accordingly, be preferred and paid as operating expenses.

2. Whether railroad employes' personal injury claims are not entitled to be preferred and paid as operating expenses in an equity receivership proceeding for the reorganization of the railroad.

3. Whether a federal court, taking jurisdiction of a railroad's property in an equity receivership proceeding, is not bound to respect an existing judgment lien, created by the statutes of the state in which the judgment was recovered against the railroad, and in which state property of the railroad is situated.

4. Whether, where an equity receivership, involving the reorganization of a railroad, is in process, and there has been no order of foreclosure or distribution of assets, a failure to file exceptions to a Special Master's report, which has not been confirmed, estops a creditor from being heard upon a question of the correctness of the conclusions of law reached by such Master upon undisputed facts.

5. Whether a creditor, irrespective of the classification or priority of his claim, has a right to file, and be heard upon, a petition to discharge receivers upon the alleged grounds of their unfitness, neglect of duty, and business affiliation with the interests which brought about the insolvency and resulting receivership of the debtor.

6. Whether due observance of the spirit and purpose of the provisions of Section 77 of the Bankruptcy Act (providing that there be appointed a disinterested trustee for a railroad being reorganized under such section) requires that a federal court refuse to continue in office as the two receivers of a railroad, being reorganized in an equity receivership proceeding, one of such receivers being a major officer of such railroad, and the other being a major representative of a corporation which holds stock control of such railroad.

7. Whether a creditor has the right to file and be heard upon a petition to terminate a receivership which commenced on December 1, 1931, and is still continuing, and which is, in substance, alleged to have become a "nursing" receivership.

Summary Statement of Matter Involved.

On February 13, 1931, petitioner recovered in the Circuit Court of the City of St. Louis, Missouri, a judgment against the Wabash Railway Company for injuries sustained on February 15, 1929, in the course of his employment as an

employe of said company, which judgment was affirmed by the Supreme Court of Missouri, in the sum of $10,000.00, and the judgment stands as of said February 13, 1931, in said amount (R. 51-52, 78-79, 105-106, 114; 103 F. [2d], l. c. 997).

On and since the date of petitioner's said judgment, the Wabash Railway Company owned, and owns, real estate in the City of St. Louis, Missouri, having a value of more than $800,000.00 (R. 52, 126). Under the provisions of Sections 1104-1105 of the Revised Statutes of Missouri 1929, said judgment became, on the said date thereof, a lien upon said real estate.

On December 1, 1931, T. J. Moss Tie Company, a general creditor, filed in the United States District Court for the Eastern District of Missouri, its bill of complaint against the Wabash Railway Company, alleging the Wabash to be insolvent and unable to pay its debts and praying the appointment of receivers (R. 2-14). On that same day the Wabash filed its answer admitting the allegations of the bill and joining in the application for the appointment of receivers (R. 14-16), and the Court thereupon, on said date, entered an order appointing Walter S. Franklin and Frank C. Nicodemus, Jr., the Wabash president and assistant general counsel, respectively, as Receivers of said Wabash (R. 16-21, 53). Also, on said day, said District Court appointed as general counsel for the said Receivers, one Nat S. Brown, who was, at said time, vice-president and general solicitor of the Wabash (R. 21-22, 16).

Thereafter, on March 19, 1932, said District Court appointed a Special Master to hear claims of Wabash creditors (R. 22-23).

Thereafter, on April 7, 1932, said District Court made an order for the filing with, and hearing by, the Master of claims of creditors of the Wabash (R. 23-25). No provi-

sion was made in such order relative to the form or contents of proofs of claim.

Thereafter, and within the time fixed by said order, petitioner filed with the Special Master his claim on his said judgment which was then pending on appeal in the Supreme Court of Missouri (R. 102, 106-107).

Thereafter, on August 31, 1932, the Wabash Receivers filed with the Special Master their answer to petitioner's said claim, admitting that judgment was rendered in favor of petitioner, as claimed by him, denying that the claim was entitled to any preference or priority, and praying that, if petitioner's claim be allowed, it be not classified as to be entitled to any priority or preference (R. 109).

On August 26, 1935, and on January 6, 1936, a hearing was had before said Special Master upon petitioner's claim (R. 102-105). Thereafter, on March 7, 1936, the Special Master filed in said District Court his partial report covering, among other things, petitioner's said claim, and reporting that petitioner's claim should be allowed in the aggregate sum of $10,587.15 as a general unsecured claim and without any lien or priority (R. 34-37). Petitioner had no notice of the filing of such report until about the time he applied for leave to file, in the said District Court, his hereinafter mentioned petition (R. 62). At the time petitioner sought to file in the said District Court his hereinafter mentioned petition, said report of the Master had not been approved or affirmed by said District Court (R. 62).

On March 1, 1937, and November 1, 1937, respectively, the trustees, under two mortgages, filed their respective bills of complaint against the Wabash for mortgage foreclosures and other judgments incident thereto. Both of these proceedings were consolidated with the original receivership proceeding against the Wabash; the Receivers

appointed in said original cause were continued as Receivers in said consolidated cause; and said consolidated cause was, and is being, carried on in said District Court as consolidated cause in equity, No. 12,099 (R. 37-44, 66-67, 80-81, 114-115).

On October 8, 1933, the said Walter S. Franklin having resigned as such Receiver to become vice-president of the Pennsylvania Railroad Company (R. 32), the said District Court appointed, as his successor, one Norman B. Pitcairn, president of another railroad subsidiary of the Pennsylvania Railroad Company (R. 33-34, 52).

At all times aforementioned, the Pennsylvania Railway Company owned, and owns, stock control of the Wabash (R. 53).

On January 26, 1938, petitioner filed in the said District Court, and in said consolidated cause, an application for leave to file therein a petition in the form to said application attached, and seeking, among other things, the discharge of said Receivers and the termination of the receivership (R. 47-77). Said petition alleged, in substance, the matters hereinbefore referred to, and further alleged, among other things:

Kuhn, Loeb & Company, an investment banking corporation, is, and for many years has been, the banker for the Pennsylvania Railroad Company; that it also had and exercised control of the Wabash and its financial policies and investments in 1926; that the Pennsylvania Railroad Company conspired and connived with Kuhn, Loeb & Company in a course of conduct whereby the Wabash was caused to, and did, purchase and acquire Lehigh Valley Railroad Company stock; that such stock purchases were made without the knowledge or approval of the Interstate Commerce Commission, and that the making of such purchases was concealed from the Interstate Commerce Com-

mission, by the making of false reports, and by the falsification of the books and records of the Wabash; that Kuhn, Loeb & Company collected and received fees, commissions and profits in excess of $1,000,000, and sold to the Wabash Company, at great profit to itself, stocks owned by Kuhn, Loeb & Company; that the foregoing was accomplished by a conspiracy between Kuhn, Loeb & Company and officers and directors of the Wabash, thus alleged to be controlled by the Kuhn, Loeb & Company, and the Pennsylvania Railroad Company; that the losses accruing to the Wabash Railway Company by said transactions were in excess of $20,000,000; that, although such transactions, course of conduct, and the losses sustained by the Wabash Company, as the result thereof, had, through a congressional investigation, been made generally known to the public, the Wabash Receivers had taken no action to recover moneys lost by the Wabash thereby; that by reason of their failure to take any such action, and because of their aforesaid relationship with the Pennsylvania Railroad Company, the said Receivers are improper persons to act as Receivers of the Wabash, and that their continuance in office, as said Receivers, is in conflict with the spirit and provisions of Section 77 of the Bankruptcy Act, enacted by Congress as a means of curbing abuses of friendly railroad receiverships, and requiring the appointment of a disinterested trustee; that the Pennsylvania has so improperly exercised its control of Wabash as to cause Wabash to suffer great losses and wasting of its assets; that the same interests which caused Wabash to sustain said losses through the mentioned transactions and course of conduct, and "which interests include Kuhn, Loeb & Company, the Pennsylvania Railroad Company, their nominees, and persons under their control," are still in control of matters pertaining to securities of Wabash Railway Company, and have obtained and possessed, and are under-

taking to exercise such powers as will permit them to direct the course of, and policies relating to, any reorganization of Wabash Railway Company; and that "it is only by such remedial legislation, and supervision and exercise of powers of the Interstate Commerce Commission, as are provided for in Section 77 of the National Bankruptcy Act, that a proper accounting on behalf of Wabash Railway and the protection of the creditors of Wabash Railway Company can be had"; that under the circumstances existing, the receivership should be terminated, so that thereby there might result the institution of a proceeding for the reorganization of the Wabash, under the provisions of said Section 77 of the Bankruptcy Act; that since the commencement of the receivership there have been practically no proceedings of a constructive nature looking to a final disposition of the action, and the termination of the receivership; that the receivership has become a "nursing" receivership; that the claim of petitioner is one entitled to priority over the liens of the mortgages, and is entitled to present payment as an operating expense.

The District Court denied petitioner's leave to file said petition, and, in so doing, ruled and held: that petitioner was but a general creditor; that his petition did not conform to the requirements of former Equity Rule No. 37; that petitioner's claim was an unsecured claim without lien or priority, and had correctly been so determined by the Special Master; that petitioner was estopped from asserting a claim for priority or preference (evidently because of petitioner's failure to except to the said report of the Special Master); that said petition stated no cause of action in equity; and that the granting of leave to file said petition would encumber and delay "the orderly process of these cases toward a reorganization of the properties of the defendant Railway Company" (R. 78-84). Thereupon, petitioner duly took an appeal to the United

States Circuit Court of Appeals for the Eighth Circuit (R. 77-78, 84-99).

On May 13, 1939, after due submission, the United States Circuit Court of Appeals for the Eighth Circuit rendered its opinion and judgment upon petitioner's said appeal (R. 113-124), affirming the said judgment and decision of the said District Court. In its said opinion, so affirming said judgment and decision of said District Court, the said Circuit Court of Appeals held: "By subsection (n) of Section 77 of the Bankruptcy Act, as amended (11 U. S. C. A., par. 205 [n]), claims for personal injuries to employees of a railroad corporation are entitled to priority. * * * But this subsection applies expressly to proceedings in bankruptcy, and * * * this is an equity receivership" (R. 120; 103 F. [2d], l. c. 1000); that, in an equity receivership proceeding for the reorganization of a railroad, personal injury claims of employees are general unsecured claims, without priority, and not entitled to payment as operating expenses; that the District Court had correctly decided that petitioner's said claim and judgment was a general unsecured claim and not entitled to any lien, priority or preference in payment; that petitioner, having failed to file exceptions to the said report of the Special Master, was estopped from asserting preference and priority of payment of his claim; and that the District Court had, and properly exercised, discretion to deny petitioner's application for leave to file his said petition in said consolidated cause.

Thereafter, on May 27, 1939, petitioner duly filed his petition for a rehearing in said cause in said Circuit Court of Appeals (R. 125-135) and said petition for rehearing was denied on the 12th day of June, 1939 (R. 137).

Reasons Relied on for Allowance of Writ.

I.

(A) Since Congress has prescribed that in railroad organization proceedings under Section 77 of the Bankruptcy Act employees' personal injury claims shall be preferred and paid as operating expenses, the decision of the Circuit Court of Appeals for the Eighth Circuit that, in an equity receivership proceeding for the reorganization of a railroad, such rule does not obtain, and that claims of employees for personal injuries are but general claims, presents an important question of federal law which has not been, but should be, settled by this Court.

(B) The decision of the Circuit Court of Appeals for the Eighth Circuit, that in an equity receivership proceeding an employee's judgment for personal injuries is but a general claim, is in conflict with the decision on the same question, of the Circuit Court of Appeals for the Fourth Circuit in the case of:

Bowen v. Hockley et al., 71 F. (2d) 781, 784-786.

II.

The decision of the Circuit Court of Appeals for the Eighth Circuit, to the effect that petitioner's failure to except to the report of the Special Master, appointed to hear claims, estops petitioner from being heard upon a question of correctness of the conclusions of law reached by the Master upon undisputed facts, is in conflict with the decisions of:

(A) The Circuit Court of Appeals for the Sixth Circuit in the case of Holman v. Cross, 75 F. (2d) 909, 913;

(B) The Circuit Court of Appeals for the Fifth

Circuit in the case of Lone Star Gas Company v. City of Fort Worth, 93 F. (2d) 584, 585;

(C) The Circuit Court of Appeals for the Second Circuit in the case of Childs v. County Trust Company of New York, 70 F. (2d) 1012 (affirming 6 F. Supp. 821), and

(D) The Circuit Court of Appeals for the Second Circuit in the cases of Employers' Liability Assurance Corporation v. Astoria Mahogany Company, 6 F. (2d) 945, 946, and People etc. v. Hopkins et al., 18 F. (2d) 731, 732, 733.

III.

The decision of the Circuit Court of Appeals for the Eighth Circuit to the effect that the District Court had discretion to refuse to permit a creditor to file and be heard upon a petition to terminate a railroad receivership which was commenced in such District Court on December 1, 1931, and is, in substance, alleged in such petition to have become a "nursing" receivership, is in conflict with the applicable decisions of this Court in:

In re Metropolitan Railway Receivership, 208 U. S. 90, 112;

Milwaukee and Minnesota Railroad Company et al. v. Soutter etc., 69 U. S. 510, 524.

IV.

(A) The decision of the Circuit Court of Appeals for the Eighth Circuit to the effect that a district court has discretion to refuse to permit a general creditor to file and be heard upon a petition praying the discharge of receivers upon the alleged grounds of their unfitness and neglect of duty presents an important question of federal law which has not been, but should be, settled by this Court. The curbing of friendly receivership abuses is of

great importance to the public generally, and the accomplishment thereof will be greatly impaired if any creditor, irrespective of rank, may be denied the right to move the discharge of receivers who are unfit, neglectful and not disinterested.

(B) Since Congress, in an effort to curb abuses of friendly receiverships has provided in Section 77 of the Bankruptcy Act for the appointment of a trustee not associated with a debtor railroad, or any holding company, connected therewith, it is of great importance to the public generally that this Court decide (as it has not yet done) whether a due observance of the spirit and purpose of such legislation does not require that a federal court of equity refuse to continue in office as the two receivers of a railroad being reorganized in an equity receivership one who is a major officer of such railroad, and one who is a major representative of a parent corporation, holding stock control of such railroad.

Prayer.

For the purpose of correcting the errors complained of and to the end that the rights of the petitioner may be determined in accordance with the law, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding it to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the records and proceedings of the said Circuit Court of Appeals in the within described cause of Peter J. Carpenter, appellant, v. Wabash Railway Company et al., appellees, No. 11,354, in equity, to the end that the judgment of said Circuit Court of Appeals in said cause may be reviewed by this Court as provided by law, and that your petitioner

may have such other relief as to this Court may seem appropriate, and that the judgment of the said Circuit Court of Appeals may be reviewed by this Honorable Court.

PETER J. CARPENTER, Petitioner,

By MARK D. EAGLETON,
HYMAN G. STEIN,
ROBERTS P. ELAM,
Counsel for Petitioner.

SUPPORTING BRIEF.

I.

Opinions of the Courts Below.

The opinion and decree of the said District Court appears at pages 78-83, inclusive, of the transcript of the record filed herewith, and it is not reported.

The opinion of the said Circuit Court of Appeals (R. 113-123) is reported in 103 F. (2d) 996.

II.

Jurisdiction of This Court.

1.

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A., Sec. 347).

2.

The following decisions sustain the jurisdiction of this Court to review the decision of the Circuit Court of Appeals for the reasons set out in the specifications of error:

Warner v. New Orleans, 167 U. S. 467;
The Anasoldo San Georgio I. v. Rheinstrom Brothers, 294 U. S. 494;
Ivanhoe Building & Loan Association of Newark v. Orr, 295 U. S. 243;
Erie Railroad Company v. Tompkins, 302 U. S. 671.

III.

The original date of the judgment of said Circuit Court of Appeals, here sought to be reviewed, is May 13, 1939

(R. 113). Petitioner's petition for rehearing was duly filed in said Circuit Court of Appeals on May 27, 1939 (R. 135), and was overruled on June 12, 1939 (R. 137). A thirty days' stay of mandate was granted on June 27, 1939 (R. 138).

IV.

Statement.

A full statement of the case has been made in the petition for writ of certiorari, and, in the interest of brevity the statement is not here repeated.

V.

Specifications of Error.

A.

The Circuit Court of Appeals for the Eighth Circuit erred in deciding and adjudging that petitioner's judgment against Wabash Railway Company, recovered by petitio in the Circuit Court of the City of St. Louis, Missouri, on February 13, 1931, is a general claim, and not entitled to any lien or priority.

B.

The Circuit Court of Appeals for the Eighth Circuit erred in deciding and adjudging that petitioner's said judgment is not entitled to present payment by the Receivers of Wabash Railway Company, as an operating expense.

C.

The Circuit Court of Appeals for the Eighth Circuit erred in failing to decide and adjudge that the Receivers of Wabash Railway Company acquired, and hold, posses-

sion of the real estate of said company, situate in the City of St. Louis, Missouri, subject to the lien which is prescribed and accorded to petitioner's said judgment by Sections 1104 and 1105, Revised Statutes of Missouri 1929, and in failing to give effect to said lien.

D.

The Circuit Court of Appeals for the Eighth Circuit erred in deciding and adjudging that petitioner's failure to except to the report of the Special Master, appointed by the District Court to hear claims, estops petitioner from being heard upon a question of the correctness of the conclusions of law of the Master upon undisputed facts.

E.

The Circuit Court of Appeals for the Eighth Circuit erred in deciding and adjudging that the District Court had, and properly exercised, discretion to deny petitioner leave to file and be heard upon a petition for the discharge of the Receivers of Wabash Railway Company upon the alleged grounds of their unfitness and neglect of duty.

F.

The Circuit Court of Appeals for the Eighth Circuit erred in that said Court, in effect, decided and adjudged that the District Court had and properly exercised a discretion to continue in office as the Receivers of Wabash Railway Company, one who is a major executive of said company, and another, who, at the time of his appointment, was a major representative of a corporation holding stock control of said Wabash Railway Company, notwithstanding the enactment by Congress, during said receivership, of the provisions in Section 77 of the Bankruptcy Act to the effect that, in proceedings under such section for

the reorganization of a railroad, the Court shall appoint a disinterested trustee.

G.

The Circuit Court of Appeals for the Eighth Circuit erred in deciding and adjudging that the District Court had, and properly exercised, discretion to refuse to permit petitioner to file and be heard upon a petition to terminate the receivership of Wabash Railway Company, which commenced on December 1, 1931, for the alleged reason that the same had become a "nursing" receivership.

H.

The Circuit Court of Appeals for the Eighth Circuit erred in deciding and adjudging that the District Court had, and properly exercised, a discretion to deny petitioner leave to file the petition which, on January 26, 1938, he presented and applied to said District Court for leave to file in said receivership proceeding.

VI.

Argument.

POINT I.

(Assignment of Errors A and B.)

Undoubtedly it was through a recognition of the fact that employees' claims for personal injuries bear a direct relationship to the operation of a railroad, and arise out of services through which a railroad is maintained as a going concern, and without which service and operation its property and the liens of mortgages thereon would become worthless, that Congress was prompted to and did provide by Section 77 of the Bankruptcy Act, that, in pro-

ceedings thereunder for the reorganization of a railroad, employees' personal injury claims shall be preferred, and paid as operating expenses. The decision of the Circuit Court of Appeals that such rule does not obtain when a railroad is being reorganized through means of a receivership action, operates to make a railroad employee's ability to secure the protection which Congress has recognized he is entitled to receive dependent, not upon those humane principles and concepts of justice which prompted such legislation, but, rather, upon the **nature of the proceeding** which those in control of a railroad, or its securities, elect as the means of effecting a reorganization. The injustice of such holding is even more marked by the fact that, as to the choice of form of a reorganization proceeding, an injured employee obviously has no voice.

The situation presented is that, if the insolvent Wabash Railroad was being reorganized under Section 77 of the Bankruptcy Act, the petitioner's claim for personal injuries, sustained through his contribution to the maintenance and operation of the Wabash, would be entitled to present payment in full (see 11 U. S. C. A., Sec. 205 [n]); but, under the decision of the courts below, because the Wabash reorganization proceeding is in the nature of an equity receivership, the petitioner's claim is practically worthless.*

This Court, through its familiarity with matters of common knowledge, judicially knows that there are other railroads being reorganized under Section 77 of the Bankruptcy Act, in the federal courts within the territorial jurisdiction of the District Court below, and that, therefore, such railroads' employees' personal injury claims have been paid in full (Cf. Central Hanover Bank & Trust

* The record shows that the Wabash is hopelessly insolvent, and if petitioner is but a general creditor, then he can, at best, be expected to receive, at some uncertain date, some form of securities, the worth of which is doubtful.

Co. v. Williams [C. C. A. 8], 95 F. [2d] 210). Here, however, the courts below hold that the same kind of a claim, must, by the same courts, be adjudged to be a general unsecured claim; and this, in effect, because those in control of the situation have seen fit to continue to seek a reorganization through a "friendly" receivership proceeding, rather than through a proceeding under said Section 77 of the Bankruptcy Act.

Petitioner respectfully submits that, just as uniformity of decisions of the federal courts on federal questions is of the utmost importance in the administration of justice, and that the rights of parties should be determined according to a uniform law of the land, and not according to the locality of the district in which a cause is tried, so is it equally true that the right of this petitioner, as an injured employee, should be protected in accordance with the principles laid down by Congress, and not determined by the **nature of the proceeding** in which a federal court has ordered him to file his claim.

Whether a federal court of equity should be permitted to use its power to operate a railroad, without regard to the priority which Congress has recognized that employees' personal injury claims should receive, is a matter of great general importance, and should be determined by this Court.

If, as the court below has ruled, the preference accorded railroad employees' personal injury claims, in proceedings under said Section 77 (n) of the Bankruptcy Act (11 U. S. C. A., Sec. 205 [n]), are not to obtain in an equity receivership proceeding for the reorganization of a railroad, what happens to the ancient and undisputed rule that "equity follows the law"? Here we have a situation in which the law-making body of the United States has accorded to railroad injured employees preferential rights in a railroad reorganization conducted through a **statutory** pro-

ceeding. Is not equity obligated to follow such law when it undertakes to classify and determine the priorities of such a claim in an equity proceeding?

But, independent of the said provisions of Section 77 of the Bankruptcy Act, there are other reasons why this Court should review the decision of the court below that a railroad employee's personal injury claim is but a general claim, and not entitled to any preference or priority in payment.

The conflict of the decision of the court below with the applicable decision of the Circuit Court of Appeals for the Fourth Circuit, in the case of Bowen v. Hockley et al., 71 F. (2d) 781, as well as the true principles of equity in the premises, readily appear from the following excerpts from the opinion of the Circuit Court of Appeals for the Fourth Circuit, in said case of Bowen v. Hockley, 71 F. (2d), l. c. 783-786:

> "• • • Uninjured laborers contribute by their labor to the operation of the business and are paid on the basis of that contribution. The employee who is injured or killed has made his contribution, • • •; and in equity and good conscience the compensation award should be held a charge on the income of the business, just as is the wage of the laborer • • •.
>
> "The principle of equity applicable is that he who seeks equity must do equity. Creditors and lien claimants need not seek the aid of equity in enforcing debts and liens. When they ask a court of equity to grant the extraordinary relief of protecting a private corporation's business from the legal process of its creditors and to operate it under order of court so as to preserve its going concern value for their benefit, they should be willing that the claims of those who have helped to give it value as a going concern and whose claims have been imposed upon it by law as a fixed expense should be paid from the income derived from its continued operation" (71 F. [2d], l. c. 783).

"For the court not to require its receiver to make the compensation payments which the state law requires of the owner of the business, would place it in the position of using its power to preserve the business for stockholders and creditors, without regard to the most helpless class of those having claims against the business itself" (71 F. [2d], l. c. 785).

"The fact that the statute does not provide for the protection of those receiving compensation payments and that no decision has dealt with their rights in the absence of statute, is no reason why a court of equity in undertaking the operation of the business should not safeguard their rights. One of the glories of equity jurisprudence is that it is not bound by the strict rules of the common law, but can mold its decrees to do justice amid all the vicissitudes and intricacies of life. The principles upon which it proceeds are eternal; but their application in a changing world will necessarily change to meet changed situations" (71 F. [2d], l. c. 786).

"Surely a court of equity, which has found means in receivership proceedings to protect the claim of the coal company which has furnished coal, the steel company which has furnished rails, and the workmen who has furnished labor prior to the receivership, is not powerless to protect the rights of the injured employee in the business which he has helped to build" * * * (71 F. [2d], l. c. 786).

In Bowen v. Hockley et al., supra, the claim had been liquidated by an award by the Workmen's Compensation Commission. In the case at bar, petitioner's claim for injuries sustained by him as an employee, was liquidated by the judgment of a court. Both claims arose out of the contribution, by an employee, to the operation of his employer's business. Whether the tribunal determining the responsibility of the employer, and the amount of the claim, be a commission or a court, and whether the claim,

as liquidated, be denominated an "award" or a "judgment," is, of a certainty, immaterial.

The court below, has, in substance, and in direct conflict with said decision of the Circuit Court of Appeals for the Fourth Circuit, held that an employee's personal injury claim is but a general claim, and that a court of equity, while operating a business through its receivers, should not require the receivers to pay an injured employee a claim for which he has recovered a judgment, and which judgment he would be entitled and able to collect, in the abence of the Court's possession and operation of the property and business through its receivers.

It may be said, however (as mentioned in the decision of the court below), the weight of authority in federal courts has long been that employees' claims for personal injuries are but general claims. But this is sufficiently answered by the language in Bowen v. Hockley, supra, that:

> "The principles upon which it (equity jurisprudence) proceeds are eternal; but their application in a changing world will necessarily change to meet changed situations" (71 F. [2d], l. c. 786).

By said provisions of Subsection (n) of Section 77 of the Bankruptcy Act [11 U. S. C. A., Sec. 205 (n)] Congress has recognized the necessity and justice of preferring, and paying as operating expenses, the personal injury claims of railroad employees. Can it be reasonably contended that a court of equity, in its consideration of claims of this character, should be any less just and reasonable, or less conscious of changing views, than Congress?

It is significant to note that the Interstate Commerce Commission, by an order effective June 1, 1914, prescribing a classification of operating revenues and operating expenses for the use of carriers by rail, in keeping of their

revenue and operating expense accounts, required that all damages and costs adjudged against a railroad company in favor of employees for personal injuries should be classified as operating expenses (R. 66).

With reference to such order the Supreme Court of Indiana, in the case of McCullough v. Union Traction Co., 206 Ind. 585, 607 et seq., 186 N. E. 300, 308 et seq., said:

> "We cannot agree to the proposition that the rules prescribed by the Interstate Commerce Commission is merely a bookkeeping method." * * *
>
> "The contention that the regulations prescribed by the Interstate Commerce Commission is merely a bookkeeping method is untenable. If the contention is true, then the system is absolutely meaningless and without substance."*

In said case of McCullough v. Union Traction Co. of Indiana, 206 Ind. 585, 598-604, 186 N. E. 300, 305-307, the Court said:

> "If such claims are operating expenses of a railroad when operated by a receiver why are they not operating expenses before a receiver has been appointed?"
>
> "* * * In the operation of railroads, accidents, and injuries to persons and property, are unavoidable, and the payment and settlement of such claims must necessarily be considered as operating expense." * * *
>
> "* * * So, in the instant case, the mortgagees for years had intrusted the property covered by the mortgage to the mortgagor for his complete control and management. They knew that in the natural course of events damage to property, and injury to persons would be done by the negligence of the servants of the mortgagor in the operation and management of the Traction Company. They knew when they took their

* The Wabash is an Indiana corporation, and a large part of its railway system is located in Indiana (R. 65-66).

mortgage that railroads cannot be operated, and managed over a long period of time, without damage to property, and injuries to persons. They also knew that it is the law of the land, that those damaged, and injured through the negligence of the railroad would be entitled to recover their damage whatever it may have been. And knowing all of these facts is it not sound reason to say that they took the mortgages with knowledge of the fact that the operating expenses of the road must be paid? And it must be conceded that such claims are considered operating expenses."

Point II.

(Assignment of Error C.)

In holding that petitioner's judgment is but a general claim, the court below, has, in effect, failed to respect a lien which petitioner had acquired, under the statutes of Missouri, prior to the appointment of receivers of the Wabash, and which lien was in full force and effect at the time of their appointment. Further, in so holding, the court below has decided an important question of local law in a way which, as hereinafter more fully appears, is in conflict with an applicable decision of the Supreme Court of Missouri, and also with the weight of authority.

Petitioner's judgment was recovered in the Circuit Court of the City of St. Louis on, and stands as of, February 13, 1931 (R. 51-52, 114). The District Court appointed receivers for the Wabash on December 1, 1931 (R. 16-21).

On the date petitioner recovered his judgment, the Wabash owned, and still owns, real estate in the City of St. Louis, Missouri, having a value of more than $800,000.00 (R. 52).

Section 1104, Revised Statutes of Missouri 1929, provides:

"Judgments and decrees rendered by any court of

record shall be a lien on the real estate of the person against whom they are rendered, situate in the County for which the Court is held."

Section 1105, Revised Statutes of Missouri 1929, provides:

"The lien of a judgment or decree shall extend as well to the real estate acquired after the rendition thereof, as to that which was owned when the judgment or decree was rendered. **Such liens shall commence on the day of the rendition of the judgment**, and shall continue for three years, subject to be revived as hereinafter provided; but when two or more judgments or decrees are rendered at the same term, as between the parties entitled to such judgments or decrees, the lien shall commence on the last day of the term at which they are rendered." (Emphasis ours.)

In LaGrange Butter Tub Co. v. National Bank of Commerce, 122 Mo. 154, 159-160, 26 S. W. 710, 711, the Court said:

"After the aid of a court of equity has been invoked * * * ordinarily, no creditor can pursue a legal remedy, at least, in such way as to obtain for himself a preference. But **the Court of equity is bound to respect legal rights and preferences already acquired**, and to make distribution accordingly." (Emphasis ours.)

In 34 Corpus Juris 631 it is stated:

"The lien of a judgment is not lost or affected by the appointment of a receiver for the judgment debtor and his taking possession of the property affected * * *."

In Clark on Receivers, Vol. 1, Sec. 541 (C), page 736, it is said:

"A judgment creditor having such judgment lien

at the time a receiver is appointed has a lien which cannot be voided by the appointment of a receiver. Such lien must be protected by the court appointing the receiver, and distribution will be made subject to such lien."

POINT III.

(Assignment of Error D.)

The court below, has, in effect, decided that petitioner's failure to except to the report of the Special Master, appointed by the District Court to hear claims, estops petitioner from being heard upon a question of the correctness of the conclusions of law reached by the Master upon undisputed facts. Such decision is in conflict with the applicable decisions of the Courts of Appeals for other circuits. (It will be borne in mind that the Special Master's said report had not been confirmed and petitioner alleged that he had but recently learned of its having been filed [R. 62].)

In Employers' Liability Assurance Corporation v. Astorja Mahogany Company, 6 F. (2d) 945, 946 (C. C. A. 2), the Court said:

"Orders of foreclosure are primarily intended for no more than safety in distribution. * * * They enable the receivers to dispose of the property, but not to forfeit the rights even of dilatory creditors."

In Holman v. Cross, 75 F. (2d) 909, 913 (C. C. A. 6), the Court said:

"It is to be noted that, with respect to the defendants who did not except, the Court confirmed the Master's report upon the facts, but noticed such legal conclusions as found no support therefrom under the rule of Smith v. Seibel et al. (D. C.), 258 F. 454. This course we approve."

In Lone Star Gas Company v. City of Fort Worth, 93 F. (2d) 584, 585 (C. C. A. 5), the Court said:

> "The Master's report is not unassailable as is argued. The reference does not appear to have been by consent of both parties to an agreed Master, but if it had been it would, under the new Equity Rule 61½, 28 U. S. C. A., following section 723, be only advisory. The District Judge appears to have felt himself overmuch bound by it."

Conclusion.

Being desirous of not burdening the Court with an unduly lengthy argument, and having called the Court's attention specifically to the questions involved, and to the reasons that exist for the issuance of the writ of certiorari, we will not argue the remaining errors hereinabove alleged and assigned.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari, and thereafter reviewing and reversing the said decision.

Respectfully submitted,

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